

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF WYOMING

FILED  
NOV 2 1995

OLIVE W. HARRIS, Clerk  
U.S. Bankruptcy Court

In re	)	
	)	
DOUBLE J CATTLE CO.,	)	Case No. 95-20112
	)	CHAPTER 12
Debtor.	)	
	)	
DOUBLE J CATTLE CO.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 95-2014
	)	
FIRST NATIONAL BANK OF WORLAND,	)	
	)	
Defendant.	)	

OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on the motion for summary judgment filed by the plaintiff/debtor, Double J Cattle Company (Double J), and the partial cross-motion for summary judgment filed by the defendant, First National Bank of Worland (FNB). At the hearing held on the motions, the court denied both motions on the grounds that there existed genuine issues of material fact which precluded summary judgment. However, upon a review of the arguments presented, the pleadings on file, and the affidavits presented, the court has determined that summary judgment is proper and resolves several of the issues.

Also pending before the court is Adversary Proceeding no. 95-2012, Double J Cattle Co. v. Lyle Geis, the First National Bank of Worland, Intervenor. Summary judgment motions were also filed

(18,12)

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in that case. The court's simultaneous opinion on those motions resolves or aids in resolving some of the issues before the court in this case.

#### JURISDICTION

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B), (F) & (K). The motions are brought pursuant to Fed. R. Civ. P. 56(a), made applicable in bankruptcy court by Fed. R. Bankr. P. 7056.

#### ISSUES

1. Whether the interest of an unperfected lien creditor, Lyle Geis, in certain cattle branded JJF, if avoided by the debtor in possession, has priority over the validly perfected security interest of FNB. The court, having determined in Adversary Proceeding no. 94-2012 that the Geis lien is avoided, also determined that FNB's lien on the JJF cows is second in priority to that avoided interest. Thus, this issue need not be further addressed in this adversary proceeding.

2. Whether Double J can avoid an alleged preferential transfer of \$38,432.51 in cattle proceeds under 11 U.S.C. § 547(b) because the avoided lien of Lyle Geis was prior to that of FNB. FNB filed a cross-motion for summary judgment on this issue.

3. Whether Double J can avoid, pursuant to 11 U.S.C. § 553, the setoffs of certain checking account funds made by FNB within 90 days preceding the filing of the underlying bankruptcy case.

4. What is the proper valuation of FNB's claim? This issue was not raised in the complaint, is pending by motion in the underlying bankruptcy case, and does not require an adversary proceeding for resolution. Additionally, disputed issues of material fact preclude summary judgment on this question. The court will defer to the already briefed and argued motion in the base case for disposition.

5. Whether cattle proceeds in the amount of \$34,587.15 escrowed with the Clerk of the Washakie County District Court are funds upon which FNB has a first priority lien. Those proceeds have been the subject of at least four (4) separate proceedings in the underlying bankruptcy case.

Subsequent to the filing of the complaint in this case, the Washakie County District Court determined that FNB has a first priority security interest in the funds ahead of Louis Holland. Double J has presented no evidence here to support its allegation that Lyle Geis had a lien on these livestock proceeds. The court has granted FNB relief from the automatic stay to apply the funds to the obligation. Consequently, this is no longer at issue either.

## DISCUSSION

The standards for entry of summary judgment are frequently stated. The court grants summary judgment only when there is no genuine dispute over a material fact, reviewing the record and reasonable inferences therefrom in the light most favorable to the opposing party. *In re Baum*, 22 F.3d 1014, 1016-1017 (10th Cir. 1994). A fact is material if it could affect the outcome of the claim, and a genuine issue is one where the trier of fact could return a verdict for the nonmoving party. *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1135 (10th Cir. 1994).

### The \$38,432.51 Livestock Proceeds

The facts are undisputed that these funds are proceeds derived from the sale of Double J's livestock. The sale was held December 6, 1994 at the Riverton Livestock Auction. The auction prepared a check payable to the debtor's general partners, John L. Folsom and John L. Gerstner, and to the First National Bank of Worland. FNB had a lien of record on the livestock sold.

Following various activities not relevant here, FNB received a replacement check in the same amount (\$38,432.51) and applied the funds to Double J's obligation owed to FNB. In this proceeding, FNB presented Exhibit 86, previously admitted in stay relief proceedings in the underlying bankruptcy case. Exhibit 86 is the brand inspector's report of the livestock sold on December 6, 1994

at the Riverton Livestock Auction. Mr. Gerstner previously admitted that this inspection tally corresponds to the funds in question here.

Double J seeks to recover the funds from FNB on the theory that when the court avoided the lien of Lyle Geis in JJF cows, Double J succeeded to the first priority position of the avoided lien; that these proceeds were derived from the sale of livestock encumbered by the Geis lien; and that, therefore, the transfer of the funds to FNB was an avoidable preferential transfer under 11 U.S.C. § 547.

Yet, to support its argument, Double J has offered no evidence that the livestock proceeds were derived from the sale of cattle encumbered by the Geis lien. The debtor's partners filed an affidavit with conclusory statements that the calves were the product of livestock secured to Geis, but without any supporting evidence. Mr. Geis had a lien on 220 cows branded JJF, pursuant to a very specific security agreement, but the brand inspector's report in Exhibit 86 is clear that the livestock sold were 125 calves branded JJ. The affidavit does not raise a genuine issue of fact.

One of the elements of a preferential transfer is that the creditor must have received more from the transfer than it would receive in a chapter 7 case had the transfer not been made. §

547(b)(5). In a chapter 7 case, a first priority secured creditor receives the value of its collateral just as FNB did here.

There being no genuine issue of material fact as to FNB's entitlement to the livestock proceeds, and Double J having presented no other theory of recovery regarding those proceeds, summary judgment for FNB is proper. Even viewed in the light most favorable to Double J, Double J cannot demonstrate that FNB received more than it would receive in a chapter 7 liquidation.

#### Bank Account Setoffs

Double J seeks to avoid FNB's setoff of two (2) separate bank account balances and the satisfaction of an account overdraft, all made within 90 days of the date Double J filed its petition. Double J alleges that the overdraft amount and the setoffs are avoidable under 11 U.S.C. § 553(b)(1) because "the insufficiency on the date of the offset was not less than any insufficiency within the 90 days immediately prior to filing."

Insufficiency is defined in § 553(b)(2) as the "amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the [creditor]." Under § 553(b)(1), the debtor in possession can recover a setoff to the extent that the creditor improved its position during the 90 days preceding the filing date. This improvement in position is determined by

calculating the amount of the insufficiencies on the appropriate dates.

Double J's argument makes no sense. Double J presented absolutely no information regarding the amount of FNB's claim at any time within the 90 days preceding the filing of Double J's petition, or the amount of the claim at the time of the setoffs.

Without documentation or a stipulation of fact, the court is at a loss to know how Double J intends a calculation of these insufficiencies, if any. Summary judgment on this issue is not proper as there are clearly unknown and disputed material facts.

The funds in dispute do not exceed \$10,000. The parties have available between them all of the factual information necessary to resolves these issues, and this information could have been presented to the court by stipulation. This issue is the only one in this adversary proceeding remaining for trial.

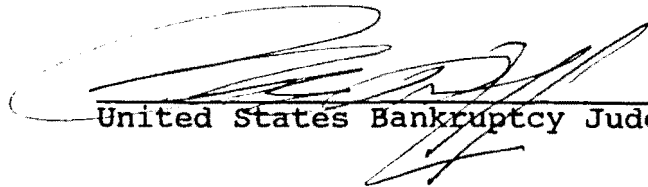
#### CONCLUSION

All matters have been resolved in this adversary except the valuation of FNB's secured claim and the questions regarding the bank account setoffs. The valuation issue is pending by motion in the underlying bankruptcy case. In this case, the court will enter summary judgment for First National Bank of Worland, holding that

FNB is entitled to \$38,432.51 in cattle proceeds, and will hold a trial on the setoff issues raised by Double J.

DATED this 2nd day of November, 1995.

BY THE COURT

  
United States Bankruptcy Judge

NOTICE OF ENTRY ON DOCKET

Notice is hereby given that Pursuant to Rule 6002, F.R.B.P., the foregoing Order or Judgment was

Entered on NOV 2 1995

By William M. O'Connell



THE JUDICIAL BRANCH  
OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE CLERK  
1000 MARYLAND AVENUE, N.W.  
WASHINGTON, D.C. 20004  
TELEPHONE: (202) 462-2000  
FAX: (202) 462-2001  
WWW.DCJUDICIALS.GOV

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Deputy Clerk

X0: G. Jensen  
K. McCarney  
J. O'Brien  
W. L. Miller  
US to  
Judge  
The Look